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VIA ELECTRONIC FILING

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The Honorable Magistrate Judge James Orenstein
United States District Court Eastern District of New York
100 Federal Plaza
P.O. Box 9014
Central Islip, NY 11722-9014

Re: *Robert Novak v. Overture Services, Inc., et al.*
Civil Action No. 02-5164-DRH-JO

Dear Magistrate Judge Orenstein:

We are local counsel representing Overture Services, Inc. ("Overture") in the above-referenced action. I write to respond to Mr. Novak's December 15, 2004, letter to the Court.

This Court granted Overture until December 27 to respond to Mr. Novak's December 15 letter. Overture requested this extension because Mr. Novak had advised Overture's counsel that he would file dismissal papers with the Court. However, as Mr. Novak has not yet done so, Overture responds to his December 15 letter.

Overture consents to Mr. Novak's request to respond to Overture's outstanding discovery requests on December 21, 2004. However, for the reasons set forth below, Overture requests that the Court enter an order finding that: (1) Overture's First Requests for Admission to Mr. Novak are deemed admitted; (2) Mr. Novak has waived any and all objections to Overture's First Interrogatories, First Document Requests, and First Requests for Admission.

1. Background

Discovery closes on January 14, 2005. The deadline for filing dispositive motions is February 15, 2005.

On October 27, 2004, Overture served its First Set of Requests for Admission, First Set of Interrogatories and First Request for Production of Documents and Things on Mr. Novak by overnight courier. (See Jones Decl., 2, & Jones Decl., Exs. A, B & C). Mr. Novak's responses were therefore due November 29, 2004. Fed. R. Civ. P. 33, 34 & 36. As of today's date, Mr. Novak has failed to answer Overture's interrogatories, failed to produce responsive documents, failed to respond to the

Requests for Admission, and failed to make any objections to Overture's discovery requests. (See Jones Decl., 3).

Mr. Novak acknowledges receiving Overture's discovery requests. On December 6, 2004, Mr. Novak sent Overture's counsel a letter stating that he "recently received" the discovery requests. (See Jones, Decl., Ex. D). At no time did Mr. Novak request an extension of time to respond to Overture's discovery requests. (See Jones Decl., 4).

On December 10, 2004, Overture's counsel served Mr. Novak with the Notice of Discovery Deposition of Robert Novak, which called for the taking of Mr. Novak's deposition on December 21, 2004. (See Jones Decl., 5). On December 13, 2004, Overture's counsel contacted Mr. Novak via telephone in an attempt to: (1) schedule a convenient time and place for his deposition; and (2) determine when and if he would respond to Overture's outstanding discovery requests. At that time, Mr. Novak was unable to provide a date certain by which he would respond to Overture's discovery requests. (See Jones Decl., 6). To accommodate Mr. Novak's schedule, Overture's counsel agreed to postpone Mr. Novak's deposition until December 29, 2004.

On December 14, 2004, Mr. Novak advised Overture's counsel that he would respond to Overture's discovery requests by December 21, 2004. (See Jones Decl., 7). Overture's counsel advised Mr. Novak this would be insufficient time to review the responses prior to the December 29 deposition, and stated that the discovery should be provided by December 17, 2004, or Overture would seek an order compelling production. (See Jones Decl., 7). This position was based on the likelihood that Mr. Novak's responses would be incomplete and would necessitate follow up, as well as the intervening holiday season.

2. Mr. Novak's Request For Time To Respond Until December 21.

Overture consents to Mr. Novak's request to have until December 21, 2004, to respond to Overture's First Set of Interrogatories and First Request for Production of Documents and Things. As this date has passed without production of documents or responses to interrogatories, Overture asks this Court to set a date for Mr. Novak to respond.

3. Overture's Requests For Admission Should Be Deemed Admitted, and Mr. Novak's Objections Should Be Deemed Waived.

Mr. Novak has failed to timely respond to, or seek an extension of time to respond to, Overture's discovery requests. Overture therefore asks that the Court find that (1) Overture's First Set of Requests for Admission are admitted, and (2) Mr. Novak has waived his objections to Overture's discovery requests.

The Federal Rules of Civil Procedure provide that if a party does not respond or object to requests for admission within 30 days of service, then the "matter is admitted." Fed. R. Civ. P. 36(a). See Clerical Apparel of New York, Inc., v. Valley Forge Insurance Co., 209 F.R.D. 316, 320 (E.D. N.Y. 2002)("facts in defendant's Request for Admissions will be deemed admitted, as plaintiff has failed to respond or object to them 'within 30 days after service of the request'…"); Weinberger v. Provident

Life and Casualty Insurance Co., No. 97 CIV. 9262(JGK)(HBP), 1999 WL 225537, * 2, (S.D. N.Y. April 16, 1999)(requests for admission deemed admitted). Mr. Novak's failure to respond or object within the required time period should result in admission of Overture's First Set of Requests for Admission.

Similarly, Mr. Novak's failure to timely object to Overture's discovery requests should result in a waiver of any objections he may have to Overture's discovery requests. See Fed. R. Civ. P. 33(b)(4) & 34; Techsearch Services, Inc. v. Gorman, No. 97 Civ. 7641 JSM KNF, 1999 WL 33024, * 2 (S.D. N.Y. January 21, 1999)(objections to interrogatories and document requests waived because of failure to timely object).

Respectfully submitted,

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